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2
3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

5 * * *

6 FERRILL J. VOLPICELLI,

Case No. 3:14-cv-00579-MMD-CLB

7 Petitioner,

ORDER

8 v.

9 RENEE BAKER, *et al.*,

10 Respondents.

11 **I. SUMMARY**

12 This is a habeas corpus proceeding under 28 U.S.C. § 2254 in which Respondents
13 have filed a motion to dismiss (ECF No. 68) in response to Volpicelli's amended petition
14 (ECF No. 49). Respondents raise numerous defenses to the petition. First, they argue that
15 this Court lacks jurisdiction to adjudicate the petition because it is a successive petition
16 under 28 U.S.C. § 2244(b). Next, they argue that Volpicelli's initial petition in this case was
17 untimely under 28 U.S.C. § 2244(d). Alternatively, Respondents argue that all of
18 Volpicelli's claims are unexhausted, procedurally defaulted, redundant, and/or barred by
19 the doctrine of res judicata. Because the Court finds that all of the claims in Volpicelli's
20 amended petition are either procedurally defaulted, untimely, and/or have been denied on
21 the merits, the Court will grant Respondents' motion.

22 **II. PROCEDURAL BACKGROUND**

23 On May 15, 2015, this Court dismissed this action because, at the time, it appeared
24 that Volpicelli's initial petition challenged the same conviction as a petition that had just
25 been denied in a separate case—*Volpicelli v. Palmer*, 3:10-cv-00005-RCJ-VPC. (ECF No.
26 5.) The Court concluded that it lacked jurisdiction because Volpicelli had not received
27 authorization under 28 U.S.C. § 2244(b)(3) to file a second or successive habeas petition.
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1 (*Id.*) The United States Court of Appeals for the Ninth Circuit denied Volpicelli's request
2 for a certificate of appealability with respect to that dismissal. (ECF No. 16.)

3 When Volpicelli subsequently sought authorization under § 2244(b)(3), however,
4 the court of appeals determined that it was not required. Citing *Magwood v. Patterson*,
5 561 U.S. 320 (2010), and *Wentzell v. Neven*, 674 F.3d 1124 (9th Cir. 2012), the court of
6 appeals held that, because he had not had a previous habeas petition challenging a 2013
7 amended state court judgment adjudicated on the merits, Volpicelli did not need
8 authorization to file a new habeas petition. (ECF No. 19 at 6-8.) The court of appeals
9 suggested that Volpicelli file another habeas petition challenging the 2013 amended
10 judgment. (*Id.* at 8.)

11 Instead of filing a new petition, Volpicelli filed a motion to reopen this proceeding.
12 (ECF No. 19.) This Court granted the motion but noted that "the 2013 amendment to
13 petitioner's state judgment of conviction involved only the assessment of certain fees and
14 had no impact whatsoever on petitioner's underlying convictions or the length of his
15 sentences." (ECF No. 20 at 2; ECF No. 73-34 at 2.) Further noting that many of Volpicelli's
16 claims had already been adjudicated against him and those that had not would almost
17 certainly be barred on procedural grounds in the Nevada courts, the Court ordered
18 Volpicelli to show cause why his petition should not be dismissed. (ECF No. 20 at 2-3.)
19 Rather than attempt to show cause, Volpicelli filed a motion to stay pending state court
20 exhaustion, which Respondents did not oppose. (ECF Nos. 23, 24.) The Court granted
21 the motion. (ECF No. 25.)

22 In the order concluding Volpicelli's state court post-conviction proceedings, the
23 Nevada Court of Appeals determined that all of his claims were procedurally barred. (ECF
24 No. 75-28.) On February 20, 2018, the Court granted Volpicelli's motion to reopen
25 proceedings and, rather than allow him to supplement his petition as he requested,
26 directed him to file an amended petition containing all of his claims in a single pleading.
27 (ECF No. 42.) After one failed attempt, Volpicelli filed an amended petition on May 8, 2018,
28 containing 27 claims. (ECF No. 49.)

1 On May 30, 2019, Respondents filed the motion to dismiss now before the Court
2 for decision. (ECF No. 68.)

3 **III. DISCUSSION**

4 **A. SUCCESSIVENESS**

5 Respondents argue that, despite the Ninth Circuit's order indicating otherwise, the
6 petition in this case must be treated as a successive petition under 28 U.S.C. § 2244(b)
7 and dismissed for lack of jurisdiction. Respondents contend that the Ninth Circuit's
8 intervening decision in *Gonzalez v. Sherman*, 873 F.3d 763, 769 (9th Cir. 2017),
9 commands this result because it acknowledged that the federal court must look to state
10 law to determine whether an amended judgment is a "new" judgment that allows a
11 petitioner to bypass § 2244(b). On this point, Respondents note that the Nevada Court of
12 Appeals rejected Volpicelli's argument that entry of the 2013 amended judgment meant
13 that the claims in his subsequent post-conviction petition were not subject to Nevada's
14 successiveness bar. (ECF No. 75-28 at 3.) Respondents also note that the court in
15 *Gonzalez* focused on whether, prior to the amendment, the petitioner was being held in
16 custody pursuant to a legally valid judgment. (ECF No. 68 at 2-3 (citing *Gonzalez*, 873
17 F.3d at 769-70)).

18 The possible impact of *Gonzalez* aside, the Ninth Circuit's order excusing Volpicelli
19 from the requirements § 2244(b) contains confusing, and perhaps erroneous, holdings.
20 The order notes in both the first and third paragraphs that Volpicelli had yet to have a
21 habeas petition challenging the 2013 amended judgment "*adjudicated on the merits.*"
22 (ECF No. 19 at 6-7 (emphasis added).) In the interceding paragraph, however, the order
23 explains that, while this Court erred by dismissing "Volpicelli's "section 2254 habeas
24 petition challenging the 2013 amended judgment" on procedural grounds, the Ninth Circuit
25 nonetheless denied a certificate of appealability ("COA") with respect to that dismissal
26 because "we found that the underlying section 2254 habeas petition *failed to state any*
27 *federal constitutional claims debatable among jurists of reason.*" (*Id.* (emphasis added).)
28 It is difficult to reconcile these holdings in that a COA determination directed at the

1 underlying constitutional claims, rather than the procedural issue, is seemingly an
2 adjudication on the merits of the petition. See *Slack v. McDaniel*, 529 U.S. 473, 485 (2000)
3 (“Determining whether a COA should issue where the petition was dismissed on
4 procedural grounds has two components, one directed at the underlying constitutional
5 claims and one directed at the district court's procedural holding.”).

6 In addition, the Ninth Circuit’s order holds that, under *Woods v. Carey*, 525 F.3d
7 886, 890 (9th Cir. 2008), this Court should have construed Volpicelli’s habeas petition
8 challenging the 2013 amended judgment “as a motion to amend the applicant’s then-
9 pending habeas petition in case number 3:10-cv-00005.” (ECF No. 19 at 7.) The problem
10 with this holding is that the “then-pending habeas petition in case number 3:10-cv-00005”
11 was a challenge to Volpicelli’s initial 2004 judgment. See *Volpicelli v. Palmer*, No. 3:10-
12 CV-00005-RCJ, 2015 WL 1995230 (D. Nev. Apr. 30, 2015). The petition could not have
13 been both a petition challenging the 2013 amended judgment (as the Ninth Circuit’s order
14 clearly characterized it) and a motion to amend the petition challenging the 2004 initial
15 judgment. Indeed, the central point of the order is that Volpicelli’s amended judgment
16 entitled him to file a *new* habeas petition.¹

17 Returning to Respondents’ successiveness argument, this Court agrees that
18 published decisions issued subsequent to the Ninth Circuit’s order militate against its
19 conclusion that the 2013 amended judgment constituted a “new” judgment excusing
20 Volpicelli from the requirements of § 2244(b). As mentioned, the amended judgment did
21 not alter in any way Volpicelli’s underlying convictions or the length of his sentences.
22 Instead, the amended judgment merely removed a “\$150 DNA testing fee” that was
23 duplicative of a fee assessed in a separate case and excused Volpicelli from reimbursing
24 the county \$500 for legal representation “due to defendant’s inability to pay pursuant to
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27 ¹The relevant holding in *Woods* is that a new *pro se* habeas petition filed before the
28 adjudication of a prior habeas petition challenging the *same* conviction is complete should
be construed as a motion to amend the pending petition rather than a successive petition.
525 F.3d at 890. There was no intervening amended judgment in *Woods*.

1 NRS 178.3975(2).” (ECF No. 73-22 at 2-3.) This was done pursuant to a motion filed by
2 Volpicelli that the district attorney did not oppose. (ECF No. 73-18.)

3 In *Magwood*, the Supreme Court held that, in interpreting the phrase “second and
4 successive” in § 2244(b), the focus must be on the judgment challenged. 561 U.S. at 332–
5 33. Accordingly, “where . . . there is a ‘new judgment intervening between the two habeas
6 petitions,’ [the petition] challenging the resulting new judgment is not ‘second or
7 successive’ at all.” *Id.* at 341–42. In a recent case, the Ninth Circuit stated as follows:

8 The holding in *Magwood* leads to the question of what constitutes a
9 “new judgment.” The Court did not provide a comprehensive answer—it
10 simply held that the prisoner’s resentencing in that case was a new
11 judgment. *Id.* at 342, 130 S.Ct. 2788. Consequently, since *Magwood*, lower
12 courts have had to decide how significant the change to a judgment must be
13 to create a new judgment.

14 *Turner v. Baker*, 912 F.3d 1236, 1239 (9th Cir. 2019). Thus, the mere entry of an “amended
15 judgment” is not, in itself, conclusive. This Court must consider the nature of the change
16 effected by the amended judgment.

17 As noted, this Court “look[s] to state law to determine whether a state court action
18 constitutes a new, intervening judgment.” *Gonzalez*, 873 F.3d at 769 (citing *Clayton v.*
19 *Biter*, 868 F.3d 840, 844 (9th Cir. 2017)). The court in *Gonzalez* determined that an
20 adjustment to a sentence to subtract credits for time served from the number of days to
21 which the defendant would have otherwise been sentenced “provided a new and valid
22 intervening judgment pursuant to which he was then being held in custody.” *Id.* at 769-70.
23 “Critical[]” to that holding was that, “under California law, only a sentence that awards a
24 prisoner all credits to which he is entitled is a legally valid one.” *Id.* at 769. The court further
25 explained that “before the amendment, the prisoner was *not* held in custody pursuant to a
26 lawful judgment of the state courts and was being held for a greater number of days than
27 was proper under California law.” *Id.* at 769-70 (emphasis in original).

28 In *Turner*, the court reached a similar conclusion with respect to an amended
judgment that altered the original judgment to give a Nevada prisoner credit for time
served. *Turner*, 912 F.3d at 1240. That is, the court held that, under Nevada case law, the

1 original judgment was invalid because it did not include “a defendant’s credit for time
2 served.” *Id.*

3 Here, by contrast, there is nothing to suggest that, under Nevada law, Volpicelli was
4 being held in custody under a legally invalid judgment prior to the entry of the 2013
5 amended judgment. The amendments to the original judgment had no bearing on his
6 custody, only on the assessment of fees. Thus, they did not “remove[] an invalid basis for
7 incarcerating [the defendant], and provide[] a new and valid intervening judgment pursuant
8 to which” Volpicelli is now being held in custody. See *Gonzalez*, 873 F.3d at 770. Also, to
9 the extent it could possibly matter, there is no showing that the original judgment was in
10 error with respect to the assessment of the attorney fee. In moving to have the fee removed
11 based on his inability to pay, Volpicelli cited to his several years of incarceration as the
12 reason he lacked the resources to pay the fee. (ECF No. 73-17 at 3.) It may well be that,
13 at the time of the original judgment nine years earlier, the state court was justified in
14 assessing the fee. As for the DNA testing fee, Volpicelli claimed that he had paid the fee,
15 but that he was entitled to a refund because he had already paid the fee in a separate
16 case. (*Id.* at 3.) At most, this was an inadvertent oversight, not something that made the
17 initial judgment “invalid or unlawful” under Nevada law. See *Turner*, 912 F.3d at 1240
18 (internal quotations omitted).

19 Nothing in the Ninth Circuit’s order excusing Volpicelli from the requirements of
20 § 2244(b) indicates or suggests that the court of appeals engaged in the type of analysis
21 subsequently mandated by *Gonzalez* and *Turner*. Nor is there anything in the record of
22 the proceedings leading up to the order. See *Volpicelli v. LeGrand*, Court of Appeals
23 Docket #: 16-71246. Accordingly, this Court concludes that reconsideration of the
24 determination is appropriate. See *Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir.
25 2002) (noting that law of the case doctrine is subject to exception when “intervening
26 controlling authority makes reconsideration appropriate”). For reasons outlined above, the
27 2013 amended judgment did not constitute a “new judgment” under *Magwood*.
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1 The Court having so concluded, Volpicelli's petition herein must be construed as a
2 challenge to his original 2004 state court judgment. Had Volpicelli filed a new petition as
3 suggested by the Ninth Circuit's order, this Court would now dismiss it for lack of
4 jurisdiction. See *Burton v. Stewart*, 549 U.S. 147 (2007). As noted above, however, the
5 Court permitted Volpicelli to reopen proceedings on his initial petition in this case.² (ECF
6 No. 20.) Further complicating matters is that, because the initial petition was submitted
7 while the petition in case number 3:10-cv-00005-RCJ-VPC was still pending, this Court
8 arguably should have treated it as motion to amend under *Woods*. See *Woods*, 525 F.3d
9 at 890.

10 Even viewed in that manner, however, the only "amendments" to the then-pending
11 petition in case number 3:10-cv-00005-RCJ-VPC proposed by Volpicelli's initial
12 submission herein was the addition of Grounds 24 and 25. (ECF No. 6 at 2.) Grounds 1
13 through 23 have been adjudicated by the Court in case number 3:10-cv-00005-RCJ-VPC.
14 Moreover, as noted above, the Ninth Circuit also concluded that all the underlying claims
15 in the initial petition herein (ECF No. 6)—*i.e.*, Grounds 1 through 25—"failed to state any
16 federal constitutional claims debatable among jurists of reason." (ECF No. 16; ECF No.
17 19 at 6-7.) Subsequent to that determination, Volpicelli amended his petition by adding
18 Grounds 26 and 27. (ECF No. 49 at 148-84.) As discussed below, those claims are barred
19 by the doctrine of procedural default.

20 B. TIMELINESS

21 Respondents argue that Volpicelli filed his initial petition herein nearly four years
22 beyond the statute of limitations. The Antiterrorism and Effective Death Penalty Act of
23 1996 ("AEDPA") imposes a one-year filing period for § 2254 habeas petitions in federal
24 court. See 28 U.S.C. § 2244(d)(1). The one-year period begins to run from the latest of
25 four possible triggering dates, with the most common being the date on which the
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27 ²To be clear, the Court is referring to the petition received by this Court on
28 November 13, 2014, (ECF No. 6), and filed in *this* proceeding, not the petition filed in
Volpicelli v. Palmer, 3:10-cv-00005-RCJ-VPC.

1 petitioner's state court conviction became final (by either the conclusion of direct appellate
2 review or the expiration of time for seeking such review). See *id.* Statutory tolling of the
3 one-year time limitation occurs while a "properly filed" state post-conviction proceeding or
4 other collateral review is pending. See 28 U.S.C. § 2244(d)(2).

5 Respondents note that the Nevada Supreme Court affirmed Volpicelli's judgment
6 of conviction on June 29, 2005. (ECF No. 68 at 4 (citing ECF No. 70-36).) Volpicelli did
7 not petition the U.S. Supreme Court for *certiorari*, so, for the purposes of § 2244(d)(1), his
8 conviction became final on September 27, 2005. See *Bowen v. Roe*, 188 F.3d 1157, 1158-
9 59 (9th Cir. 1999) (holding that, when no petition for *certiorari* to the United States
10 Supreme Court is filed, direct review is considered to be final 90 days after the decision of
11 the state's highest court). Respondents further note that the statutory period was tolled
12 under § 2244(d)(2) from November 9, 2005, until December 29, 2009, by virtue of
13 Volpicelli's state post-conviction proceeding. (ECF No. 68 at 4 (citing ECF Nos. 71-4 72-
14 30).) Consequently, Volpicelli had until November 16, 2010, to file a timely petition.

15 Volpicelli did file a timely petition in case number 3:10-cv-00005-RCJ-VPC. That
16 proceeding did not, however, toll the statutory period. See *Duncan v. Walker*, 533 U.S.
17 167, 172 (2001). And, as discussed above, the 2013 amended judgment was not a "new
18 judgment" that would give rise to a new one-year statutory period. Thus, this Court agrees
19 that Volpicelli filed his petition in this case well beyond the statutory period under §
20 2244(d).

21 C. PROCEDURAL DEFAULT

22 Respondents argue that all the claims the Court found unexhausted in case number
23 3:10-cv-00005-RCJ-VPC are barred under the doctrine of procedural default. Because the
24 claims in this proceeding parallel those in that case, the claims to which Respondents refer
25 are Grounds 1 through 6, part of Ground 7, part of Ground 8, part of Ground 9, part of
26 Ground 11, Grounds 12 through 17, part of Ground 18, Grounds 19 through 22, and part
27 of Ground 23. See *Volpicelli v. Palmer*, No. 3:10-CV-00005-LRH, 2012 WL 1816154, at
28 *16-*17 (D. Nev. May 17, 2012).

1 A federal court will not review a claim for habeas corpus relief if the decision of the
2 state court denying the claim rested on a state law ground that is independent of the
3 federal question and adequate to support the judgment. See *Coleman v. Thompson*, 501
4 U.S. 722, 730-31 (1991). The Court in *Coleman* stated the effect of a procedural default
5 as follows:

6 In all cases in which a state prisoner has defaulted his federal claims
7 in state court pursuant to an independent and adequate state procedural
8 rule, federal habeas review of the claims is barred unless the prisoner can
9 demonstrate cause for the default and actual prejudice as a result of the
alleged violation of federal law, or demonstrate that failure to consider the
claims will result in a fundamental miscarriage of justice.

10 *Id.* at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986).

11 A state procedural bar is “independent” if the state court explicitly invokes the
12 procedural rule as a separate basis for its decision. *McKenna v. McDaniel*, 65 F.3d 1483,
13 1488 (9th Cir. 1995). A state procedural rule is “adequate” if it is “clear, consistently
14 applied, and well-established at the time of the petitioner's purported default.” *Calderon v.*
15 *United States Dist. Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996) (citation and internal
16 quotation marks omitted).

17 In April 2013, Volpicelli filed a post-conviction petition in the state court containing
18 all the claims in his then-pending federal petition in case number 3:10-cv-00005-RCJ-
19 VPC. (ECF Nos. 73-14, 73-15.) The Nevada Court of Appeals ultimately determined that
20 the lower court did not err in denying claims 1 through 22 of his state petition as successive
21 under NRS § 34.810(1)(b),(2),(3). (ECF No. 75-28). The court also concluded that,
22 although the lower court had addressed it on the merits, a claim “that defense counsel
23 was ineffective for failing to protect him from the habitual criminal adjudication” was also
24 procedurally barred because Volpicelli’s “good cause” justification for raising the claim a
25 second time was available to him in 2008, but he did not pursue the claim “within a
26 reasonable time after its basis became available.” (*Id.* at 2-3 (citing *Hathaway v. State*, 71
27 P.3d 503, 506 (Nev. 2003)).

1 The Ninth Circuit has long held that Nevada's application of its successiveness rule
2 in NRS § 34.810(2) is an independent and adequate state ground for procedural default.
3 *Vang v. Nevada*, 329 F.3d 1069, 1074 (9th Cir. 2003); *Bargas v. Burns*, 179 F.3d 1207,
4 1210-12 (9th Cir. 1999). Volpicelli has not advanced any argument or authority challenging
5 the adequacy of the bar. See *Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir. 2003)
6 (holding that, once the State pleads a state procedural bar as an affirmative defense, the
7 burden then shifts to the petitioner "to place that defense in issue," which the petitioner
8 may do "by asserting specific factual allegations that demonstrate the inadequacy of the
9 state procedure). In addition, Volpicelli has not made a showing of cause and prejudice or
10 established that failing to consider any of the claims would result in a fundamental
11 miscarriage of justice. Thus, this Court concludes that the procedural default doctrine bars
12 federal court review of the claims found unexhausted in case number 3:10-cv-00005-RCJ-
13 VPC.

14 **D. GROUNDS 24 THROUGH 27**

15 As noted above, Grounds 24 through 27 were not included in the petition
16 adjudicated in case number 3:10-cv-00005-RCJ-VPC. The claims are all premised on the
17 trial court's imposition of what Volpicelli characterizes as an "illegal sentence" and/or his
18 counsel's alleged failure to protect him from same. (ECF No. 49 at 138-83.) Respondents
19 argue that the claims are either redundant of Grounds 6 and 18, unexhausted in state
20 court, or procedurally defaulted.

21 "An application for a writ of habeas corpus on behalf of a person in custody pursuant
22 to the judgment of a State court shall not be granted unless it appears that . . . the applicant
23 has exhausted the remedies available in the courts of the State." 28 U.S.C. §
24 2254(b)(1)(A). To exhaust his Nevada remedies, Volpicelli had to give the Nevada courts
25 a "fair opportunity" to act on his constitutional claims before presenting them to the federal
26 courts. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999).

27 Volpicelli insists that Grounds 24 through 27 were exhausted in his last state post-
28 conviction proceeding. (ECF No. 78 at 11-14.) All four of the "grounds" are essentially

1 variations on two core claims: (1) the state court violated Volpicelli's right to equal
2 protection and due process by sentencing him under the habitual criminal statute; and (2)
3 he was deprived of effective assistance of counsel because his attorneys allowed it to
4 happen. (ECF No. 49 at 138-83.) While he did not present claims identical to those now
5 alleged as Grounds 24 through 27, he fairly presented the substance of the claims to the
6 Nevada courts in his last state post-conviction proceeding. (ECF Nos. 73-14, 73-15, 74-
7 32, 75-18). See *Picard v. Connor*, 404 U.S. 270, 278 (1971) (providing that the exhaustion
8 requirement is satisfied where claims are substantially equivalent).

9 That being the case, the claims are procedurally defaulted for the reasons
10 discussed in Section III(c) above. Volpicelli suggests the underlying claims are sufficient
11 to establish his actual innocence with respect to his habitual criminal sentence such that
12 the Court's failure to consider the claims would result in a fundamental miscarriage of
13 justice (ECF No. 78 at 11-12). See *Schlup v. Delo*, 513 U.S. 298, 314 (1995).

14 While the Nevada Supreme Court did determine that the trial court erred with
15 respect to one of the convictions used to adjudicate Volpicelli a habitual criminal, it
16 concluded that the error was harmless because, even after discounting the improper
17 conviction, the State presented a sufficient number of past felony convictions to sustain
18 the enhancement. (ECF No. 72-28 at 3-5.) Because the record plainly establishes that he
19 was eligible for the habitual criminal sentence notwithstanding the error, Volpicelli cannot
20 show actual innocence with respect to his sentence. See *United States v. Maybeck*, 23
21 F.3d 888, 894 (4th Cir. 1994) (holding that the actual innocence exception, while
22 applicable to non-capital sentencing, is not available if the defendant was not prejudiced
23 by the sentencing error).

24 Volpicelli has not demonstrated that his default should be excused. Thus, to the
25 extent they are not redundant of claims raised elsewhere in his amended petition, Grounds
26 24 through 27 are barred by the doctrine of procedural default.

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1 **E. RES JUDICATA**

2 Respondents argue that the principles of res judicata should bar the re-litigation of
3 claims this Court has already adjudicated on the merits—*i.e.*, ineffective assistance of
4 counsel claims in Grounds 7, 8, 9, 11, and 18(b). However, despite a suggestion to the
5 contrary in this Court’s order to show cause (ECF No. 20 at 2), the abuse-of-the-writ
6 doctrine and the bar on “second or successive” applications leave little room in habeas
7 corpus proceedings for application of the traditional res judicata doctrine. See *Schlup*, 513
8 U.S. at 317-23; *Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530, 538 (9th Cir.
9 1998). Nonetheless, the claims at issue are either barred as untimely to the extent this is
10 a separate proceeding from case number 3:10-cv-00005-RCJ-VPC or they are denied on
11 the merits for the reasons provided by the Court in denying relief in that proceeding.³

12 **F. PETITIONER’S JURISDICTIONAL ARGUMENT**

13 Volpicelli’s response to Respondents’ motion to dismiss relies primarily on an
14 argument that his petition in case number 3:10-cv-00005-RCJ-VPC was “premature” and
15 that, as a result, this Court lacked jurisdiction to adjudicate it. (ECF No. 78.) This argument
16 appears to be premised on the assertion that the federal court was without habeas
17 jurisdiction until the state district court entered an order on March 8, 2016, (ECF No. 74-
18 30), adjudicating a claim that been included in Volpicelli’s 2005 state petition, but had been
19 overlooked by the state court in that proceeding.⁴

20 Volpicelli cites to no controlling legal authority to support this argument and this
21 Court can discern no theory upon which it might be valid.

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³In addition, the Court again notes that the Ninth Circuit, in denying a COA,
25 determined that Grounds 1 through 25, “fail[ed] to state any federal constitutional claims
26 debatable among jurists of reason.” (ECF No. 16 (citing 28 U.S.C. § 2253(c)(2)-(3);
Gonzalez v. Thaler, 132 S. Ct. 641, 648 (2012)).

27 ⁴The claim at issue is the claim that defense counsel was ineffective for failing to
28 protect Volpicelli from the habitual criminal adjudication—*i.e.*, the same claim the Nevada
Court of Appeals subsequently determined to be procedurally defaulted because Volpicelli
did not pursue it “within a reasonable time after its basis became available.” (ECF No. 74-
30; ECF No. 75-28 at 2-3.)

1 **IV. CERTIFICATE OF APPEALABILITY**

2 This is a final order adverse to Volpicelli. As such, Rule 11 of the Rules Governing
3 Section 2254 Cases requires this Court to issue or deny a COA. Accordingly, the Court
4 has *sua sponte* evaluated the claims within the petition for suitability for the issuance of a
5 COA. See 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

6 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner “has
7 made a substantial showing of the denial of a constitutional right.” With respect to claims
8 rejected on the merits, a petitioner “must demonstrate that reasonable jurists would find
9 the district court’s assessment of the constitutional claims debatable or wrong.” *Slack*, 529
10 U.S. at 484 (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural
11 rulings, a COA will issue only if reasonable jurists could debate: (1) whether the petition
12 states a valid claim of the denial of a constitutional right; and (2) whether the Court’s
13 procedural ruling was correct. See *id.*

14 Having reviewed its determinations and rulings in adjudicating Volpicelli’s petition,
15 the Court declines to issue a certificate of appealability for its resolution of any procedural
16 issues or any of Volpicelli’s habeas claims.

17 **V. CONCLUSION**

18 For the reasons discussed above, all of the claims in Volpicelli’s amended petition
19 (ECF No. 49) are either procedurally defaulted, untimely, and/or have been denied on the
20 merits. Thus, the Court will grant Respondents’ motion to dismiss the petition.

21 It is therefore ordered that Respondents’ motion to dismiss (ECF No. 68) is granted.
22 The amended petition for writ of habeas corpus (ECF No. 49) is dismissed.

23 It is further ordered that a certificate of appealability is denied.

24 It is further ordered that the Clerk of Court is directed to enter judgment accordingly
25 and close this case.

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1 It is further ordered that Respondents' motions for extension of time (ECF Nos. 79,
2 80) are granted *nunc pro tunc* as of their respective filing dates.

3 DATED THIS 18th day of February 2020.

A handwritten signature in blue ink, appearing to read 'Miranda M. Du', is written over a horizontal line.

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5 MIRANDA M. DU
6 CHIEF UNITED STATES DISTRICT JUDGE
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